No. 00-1927

IN THE

Supreme Court of the United States

JESSE ODEN,

Petitioner,

v.

OKTIBBEHA COUNTY, MISSISSIPPI
DOLPH BRYAN, individually and in his
official capacity as Sheriff of
Oktibbeha County,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

The Complaint before the lower Court dealt with the issue of whether or not Plaintiff, Deputy Jesse Oden of the Oktibbeha County Sheriff's Department was a victim of race discrimination when the Defendant Sheriff Dolph Bryan made a decision to designate Deputy George Carrithers as "Chief Deputy".

Both Deputy Oden and Deputy Carrithers joined the Sheriff's Department at the same time, September 1976.

Oden was employed part time; starting as a radio operator and then patrolling with a constable, which was not paid work. (R. Vol. 2 Oden p. 5-6).

Carrithers began as a part time jailer (R. Vol. 2 Oden p. 7). Oden was promoted to road deputy in 1977 patrolling at night and weekends. (R. Vol. 2 Oden p. 8). Because of the small size of the department and budget, he was only allowed to work 32 hours a week. In 1979, Oden was offered a full time position as Deputy. (R. Oden p. 9). At the time, there were only two deputies at the Sheriff's office.

In 1980, Carrithers became a full time road deputy. In 1986, the Chief Deputy who had been there prior to the Sheriff was fired and Oden approached the Sheriff about the position and was told because of the size of their office he was not going to appoint a Chief Deputy. (R. Oden p. 15).

At the same time, a secretary quit and the Office was in need of administrative help. (R. Vol. 3 p. 281). Carrithers began to help out and over time, became the Administrative Assistant. Oden stated he did not question the Sheriff.

In March 1996, Oden had a heart attack and then surgery which kept him out of work until July 1996. In December 1996, Bryan designated Carrithers as Chief Deputy. Neither Oden nor Carrithers duties or pay changed as a result of this designation as Chief Deputy.

REASONS FOR DENYING THE WRIT

The Petitioner in an effort to obtain certiorari review, suggests that the Fifth Circuit misapplied the scope of 42 U.S.C. § 1981 based upon a misreading of *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), in denying the petitioner's punitive damages. Petitioner argues that a conflict among the circuits on the question of whether or not *Jett* has been overruled and § 1981 offers an independent cause of action warrants this review.

I. Petitioner erroneously suggest that *Jett* has been overruled by implication in the 1991 amendment to 42 U.S.C. § 1981.

Beginning with a broad assault on the *Jett*, *supra*, Petitioner finds solace in the Ninth Circuit's opinion in *Federation of African-American Contractors v. Oakland*, 96 F.3d 1204 (9th Cir. 1996) over the question of whether or not the 1991 amendment to § 1981 actually overturned *Jett*. Petitioner then attempts to weave a more expansive web of the relationship between § 1981, § 1983 and Title VII to support a view that the Appeals Court was in error in Oden.

The error here lies principally upon the Petitioner when he attempts to over broaden the Court's reasoning and conclusion in *Federation*, *supra*, and what he suggests is a conflict with *Jett*, *supra*.

While it is an accurate observation that there is a fundamental difference in the application of § 1981 under *Jett* and *Federation*. However, this does not manifest itself in persuasive support of the Petitioner's conclusion.

The gensis of this conflict lies in the interpretation of Congress's intent in amending § 1981 in 1991. While the Ninth Circuit went to elaborate steps to find *Jett*, *supra*, overruled by the 1991 amendment they remained somewhat timid in their approach and cautious in their conclusion. First the Ninth Circuit relies on a *Cort*[1] analysis to find that Congress intended to create by implication a private cause of action. We would submit that the "implication" of amendment should not be favored in statutory construction and does not establish great confidence in the conclusion *Butts v. County of Voulusia* 222 F.3d 891 (11th Cir. 2000).

To follow the Petitioner's path requires more than an implication. The legislative history of the 1991 act is sparse at best and does not reveal any clear intent to amend or to alter *Jett*. The Court has had frequent occasion to note that such indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication. "As a general matter, when a particular interpretation of statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constructions*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).

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1. *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975). In *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988) there is a suggestion that *Cort* has been "effectively overruled".

The intent of Congress remains the ultimate issue, however, and unless this congressional intent can be inferred from the language of the statute structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. The Court has long since abandoned its hospitable attitude towards implied rights of action. The recent history of the Court's holding is one of repeated rejection of claims of an implied right. *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988).

In enacting the Civil Rights Act of 1991, Congress gave little discussion to subsection (c) of Section 1981. At no time in either the official summaries or in floor debate surrounding the enactment of subsection (c) was there any mention of *Jett* or the scope of municipal liability under Section 1981.[2] It is unlikely that his glaring omission was accidental or the product of respectful restrain. Certainly Congress did not hesitate elsewhere in the same reports to denounce Supreme Court's decisions.

The Fifth Circuit's holding is strengthened by Congress' failure to make any reference to *Jett* or the issue of municipal liability in adding subsection (c). In a statute that was passed expressly to overturn or modify a number of Supreme Court decisions, including decisions involving § 1981, it would be difficult for the Court to find that an amendment that clearly was intended to address certain Supreme Court decisions by name had in fact overturned another (Jett) without any mention or discussion but rather on an implied reasoning of legislative intent.

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2. *See* H.R. Rep. No. 40 (I) at 92, 141, *reprinted* in 1991 U.S.C.C.A.N at 630, 670.

Petitioner attempts to take a much broader approach with a total overturning of *Jett*, *supra*, and an implied amendment of § 1981. The Petitioner would argue that under those circumstances he can sue an autonomous and independently elected official under Title VII for racial discrimination in a failure to promote case and obtain compensatory damages against the local government and Sheriff and then maintain a punitive damage claim against the same under § 1981. This entire approach is fatally flawed and fails to recognize the distinction between Title VII, § 1981 and § 1983 and individual capacity suits, under this factual situation.

First one must find and conclude that a statue which contains or effects fundamental immunities and opens up a new cause of action against a political subdivision which subjects it to punitive damages can be amended by implication. In light of the Court's recent refrain to Congress on the over extension of the Commerce Clause, we find it hard to accept the petitioner's argument. One must tread lightly when implying the abrogation of immunities or affecting the federal balance.[3]

This same reluctance should manifest in any implied amendment removing immunity from local political subdivision and subjecting them to punitive damages.

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3. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L. Ed. 3d 252 (1996); *see also Wheeling U Lake Erie Railway Co. v. Public Utility Comm'n of Pa.*, 141 F.3d 88, 91 (3d Cir. 1998). *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd*, 131 F.3d 353, 357 (3d Cir 1997), *aff'd* 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).

II. Neither the Congress or this Court has exercised any opportunity to overrule the holdings in *Jett.*

This Court has had other occasions since 1991 to review the amendment of § 1981 and any apparent conflict and overrule *Jett.* That has not been done and in fact in two subsequent cases *Jett* was cited with approval. *McMilliam v. Monroe County Alabama*, 117 S. Ct. 1734, 520 U.S. 781, 138 L. Ed. 2d 1 (U.S. Ala. 1997) *Board of County Commissioners of Bryan Co., Ok. v. Brown*, 117 S. Ct. 1382, 520 U.S. 397, 137 L. Ed. 2d 626 (U.S. Tex. 1997). *Jett* has been cited positively in hundreds of cases throughout the country. The fundamental law of *Jett* remains valid notwithstanding the amendment by implication. Numerous Courts have declined the invitation to overrule the holding in *Jett.*[4]

III. Petitioner's reliance upon the holding in *Federation of African American Contractors* v. *Oakland*, 96 F.3d 1204 (9th Cir. 1996) ignores the fundamental commonality with the holding in *Jett.*

Any difference between *Jett* and *Federation* is not that great when distilled to the underlying foundation necessary to assert either § 1981 or § 1983 claims and remedies.[5]

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4. *See, e.g., Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995); *Johnson v. City of Ft. Lauderdale, Fla.*, 903 F. Supp. 1520, 1522-23 (S.D. Fla. 1995), *aff'd*, 114 F.3d 1089 (11th Cir. 1997); *Philippeauz v. North Cent. Bronx Hosp.*, 871 F. Supp. 640, 654-56 (S.D.N.Y. 1994), *aff'd*, 104 F.3d 353 (2d Cir. 1996), *cert. denied*, 520 U.S. 1105, 117 S. Ct. 1110 (1997).

5. *See Federation*, 96 F.3d at 1210-14.

Even those courts which permit § 1981 claims to proceed against municipal actors including the Ninth Circuit have applied to those § 1981 claims the same custom or policy requirement found with § 1983 cases as set forth in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

While *Jett* was decided prior to the 1991 amendments any semblance of conflict does not rise to a level of amelioration of fundamental law. Any schism between *Jett* and *Federation* is simply not as wide nor as deep as the Petitioner would like the Court to accept, even assuming that the reasoning of the Ninth Circuit is valid.

The Court in *Jett*, *supra*, held that in order to enforce § 1981, one must invoke § 1983 which requires an allegation and proof of the state actors acting pursuant to a "policy or custom".

The Ninth Court in *Federation*, *supra* concluded that the amended § 1981 created an implied cause of action against state actors, relieving any plaintiff of invoking § 1983 to remedy a violation of § 1981. However, the Court concluded that in raising a violation under § 1981 and bringing a cause of action thereunder requires an allegation and proof of a "policy or custom", the same prerequisite as § 1983.[6]

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6. A governmental entity can be sued and subjected to monetary damages and injunctive relief under 42 U.S.C. § 1983 only if its official policy or custom causes a person to be deprived of a federally protected right, *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403 (1997); *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 697 (1978).

The fact is not withstanding either holding there is no fundamental conflict in the standard to be employed or results that can be achieved whether you employ *Jett* or *Federation*. In *Federation*, at 1214, the Court wrote;

> Implying a cause of action directly under § 1981, moreover, will not disrupt federal civil rights litigation, and will impose no greater burden on government defendants, who under *Jett* were subject to suits under 42 U.S.C. § 1981. Allowing plaintiffs to bring suits against municipalities directly under § 1981 to enforce § 1981 rights instead of under § 1983 imposes no substantive change on federal civil rights law.

Respondent submits that the reverse is equally true, adhering to *Jett*, any appearances of conflict between *Jett and Federation* is immaterial to the Petitioner's case in that it is flawed under either prescription of either Court.

IV. Petitioner's arguement, even with the wholesale acceptance of the view of the Ninth Circuit and the overruling of *Jett* would still not resurrect Petitioner's cause nor would such a decision by the Court be dispositive of this case.

Petitioner's argument is untenable due to the failure of his complaint to properly invoke § 1981 and or § 1983.

The guise of conflict does not lessen the Petitioner's flawed argument. The substantive issues have not changed whether you consider § 1981 or § 1983. The overruling of *Jett* affords petitioner nothing more. His task remains the same. Petitioner has a "heightened pleading" requirement

under either § 1981 as viewed by *Federation supra*, or § 1983 as applied to § 1981 as viewed by *Jett*, *supra*. The Fifth Circuit in its Oden opinion recognized this flaw in the petitioner's argument.

First if you take the *Federation*, *supra*, reasoning the Petitioner's cause remains dependent upon proper allegations and proof of a "custom or policy". The Fifth Circuit noted the failure of the Petitioner's case on this requirement in footnote 3 to the Court's opinion.

Second, Petitioner has attempted in it's appellate arguments to weave back and forth under a broad umbrella that this case proceeded under Title VII, § 1981 and § 1983. Depending upon the issue, Petitioner employed the standards for each in a selective application that widely misses the mark.

The Petitioner's complaint in the District Court lacked the rudimentary pleadings necessary to state a cause of action under either § 1983 or § 1981, As a result any conflict or overruling of *Jett* is moot and Petitioner's case cannot be resuscitated by further appeal.

In *Johnson v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019, 110 S. Ct. 718, 107 L. Ed. 2d 738 (1990), the Court carefully analyzed the relationship between Title VII and Section 1983.

> Although Title VII supplements and overlaps § 1983, it remains an exclusive remedy when a state or local employer violates only Title VII. When however, unlawful employment practices encroach, not only on rights created by Title VII,

> but also on rights that are independent of Title VII, Title VII ceases to be exclusive. At this point, § 1983 and Title VII overlap, providing supplemental remedies.

The Plaintiff in this case failed to assert any § 1983 claim or to reference § 1983 in his complaint or to allege any "custom or policy" to support either a § 1983 or § 1981 claim. This void is fatal to any suggestion on appeal that he may invoke liability under a § 1983 standard, whether it be § 1981 alone or § 1981 through § 1983.

"Accordingly, because plaintiff did not invoke § 1983 in their complaint, the Court concludes that their § 1981 claims are due to be dismissed". *Anderson v. Bd. Of School Commission of Mobile County*, 78 F. Supp. 2d 1266 (S.D. Ala. 1999). The same fundamental result would exist even if *Federation* analysis was instituted.

Under *Jett*, the failure to properly plead § 1983 is fatal to sustaining the petitioner's § 1981 claim. The Petitioner simply failed to provide the necessary foundations in its complaint whether one accepts the *Jett* view or the *Federation* view. Two Fifth Circuit cases are illustrative.

In order to hold a municipality or a local government unit liable under Section 1983 for the misconduct of one of its employees, a plaintiff must initially allege that an official policy or custom was a cause in fact of the deprivation of rights inflicted. *See Spiller v. City of Texas City Police Dep't.*, 130 F.3d 162 (5th Cir. 1997) and *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521 (5th Cir. 1996). This must be viewed as most instructive when considering the Petitioner's arguement. Accepting the logic and reasoning in *Federation* would afford the Petitioner the same result.

The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts.[7] This the Petitioner failed to do.

In this case the Petitioner/plaintiff filed a complaint with EEOC, obtained a letter for the Right to Sue and filed his complaint. No reference or pleading asserted a § 1983 claim. There was only one attempt made at a suggestion of a county "policy". (Rec. Vol. 1, p. 149). This suggestion was solicited from a former County Supervisor and represented his opinion. However the fact is, and the Appellee acknowledged, the County in fact had a nondiscrimination policy. In fact Oden had been promoted three times prior to this. Petitioner's cause is defective under either *Jett* or *Federation*. As a result Petitioner's case cannot be resurrected at this stage.

V. Petitioner reliance on a "conflict" to shore up the flaws in Petitioner case misses the mark.

Petitioner's argument is more about procedure than substance and as a result even assumption of the correctness of the Ninth Circuit's reasoning on the impact of the 1991 amendments to § 1981 would not alter the results of this case.

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7. The facts necessary have been referred to a "heightened pleading" which requires allegations of fact which focus on the conduct of the individual who caused the plaintiff's injury. *Reyes v. Sazan*, 168 F.3d 159, 161 (5th Cir. 1999). *See also Wallace v. Dallas Independent School District*, 2000 WL 575219 No. Civ. A. 3:97-CV2820L; N.D. Tex. May 11, 2000.

Whether the relationship between § 1981, § 1983 and Title VII, is that as announced by this Court in *Jett*, *supra*, and applied by the Fifth Circuit or that as "implied" by the Ninth Circuit's reasoning, the bottom line remains the same. In order for the Petitioner to pursue a § 1981 claim independently of § 1983 through § 1981 or a § 1981 claim through § 1983 he must first properly plead and meet the burden of alleging and proving a "custom or policy."[8]

The Petitioner is not prevented from seeking recourse for the violation of any rights and is armed with an arsenal of weapons. However it is incumbent that he properly employ them. Petitioner is now seeking a second opportunity to amend his pleadings by implication through the suggestion of divergent opinions of the various circuits. Yet the substance of the issue remains the same and even accepting Petitioner's reliance on *Federation* would not be dispositive of this case.

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8. In Considering whether the amendment to 42 U.S.C. § 1981 abolishes the "policy or custom" requirement set forth in Monell and reinforced in Jett, we note that the new § 1981(c) contains language very similar to that of 42 U.S.C. § 1983. Subsection 1981(c) provides that § 1981(a) rights are protected against "impairment. . . . *under color* of State law, while 42 U.S.C. § 1983 imposes liability for the deprivation of rights resulting from actions taken '*under color*' of any statute, ordinance, regulation, custom, or usage of any State[.]" The Supreme Court based its "policy or custom" requirement, in part, on this very language. Because Congress made use of very similar language in enacting § 1981(c), we conclude that it thereby intended to import into the new subsection the traditional "policy or custom" requirement set forth in *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38, and applied to § 1981 violations in *Jett*, 491 U.S. at 735-36, 109 S. Ct. at 2722-23.

Under Title VII , suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate. The relief granted under Title VII is against the employer, not individual employees.[9]

In this case we are dealing with an independently elected constitutional officer who is the actual employer, and that is the Sheriff. The Sheriff, in denying Oden promotions acted in an official capacity.[10] There are no allegations that the Sheriff or anyone else did anything to violate any other protected rights of the Petitioner.

The bottom line overlooked by the Petitioner is the fact that in order to maintain a Title VII cause of action and a § 1983 or § 1981, the petitioner must assert a right under either and then plead. Independent rights, those not created by Title VII, could be vindicated pursuant to § 1981 or § 1983. The Petitioner sought neither. Petitioner is attempting to vindicate the same claim under the same set of facts against the same affiant seeking compensatory damages under Title VII, and because he is prevented under Title VII, to seek punitive damages under § 1981[11].

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9. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

10. *Harvey v. Blake*, 913 F.2d 225 (5th Cir. 1990); *Grant v. Lone*, 231 F.3d 649 (5th Cir. 1994).

11. *Ratliff v. City of Milwaukee*, 795 F.2d 612, 623 (7th Cir. 1986); *Alexander v. Chicago Park District*, 773 F.2d 850, 855-56 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095, 106 S. Ct. 1492, 89 L. Ed. 2d (1986); *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299, 301 (7th Cir. 1985); *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984); *Owens v. Rush*, 654 F.2d 1370, 1380 n.12 (10th Cir. 1981).

Petitioner poses another question to the Court relative to the availability of punitive damages under § 1981 by attempting to sue the Sheriff in his individual capacity. The question is academic in that the Petitioner did not establish the basis of a § 1981 case under the *Federation* holding.

Petitioner's argues that the availability of punitive damages under § 1983 against governmental officials sued individually should be equally true under § 1981. Petitioner's recognition of this similarity as the fundamental burden imposed under each to plead a "custom or policy" is welcome. The leap beyond to a conclusion that punitive damages should be permissible under § 1981 under these circumstances overlooks several important facts and begs the point.

The petitioner must do more than simply style his complaint as a suit against the Sheriff in his individual capacity. Petitioner must state a claim based upon rights independent of Title VII. Otherwise he falls within the bounds of Title VII which prohibits punitive damages against political subdivisions. The Court was correct in denying punitive damages in this case. Petitioner's Potemkin approach fails.

CONCLUSION

The Petitioner's case lacking critical elements does not warrant review under any pretext or by injecting a conflict between this Court and the Ninth Circuit. It is not necessary or warranted simply because of the infirmity in the Petitioner's case is terminal before any conflict can be considered. For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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